

# **Waterway and Wetland Handbook**

## **CHAPTER 30**

### **NAVIGABILITY**

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#### **A. PURPOSE**

Navigable waterways are those that are public and protected by law. Navigability is the critical element which establishes public rights in a waterway. Even where certain uses of nonnavigable waters may require a permit, it is because of the potentially adverse impacts on navigable waters that we have authority. Thus the question of navigability determines whether certain requirements may be imposed on the use or modification of rivers, streams and lakes.

#### **B. MECHANISM**

Determining that a body of water is navigable means that the Department has jurisdiction under the water regulatory laws of Chapters 30 and 31, Wisconsin Statutes.

Section 30.10, Wis. Stats., declares all lakes, streams, sloughs, bayous, and marsh outlets which are navigable-in-fact for any purpose whatsoever to be navigable and public waters. Through their subsequent decisions, the Wisconsin Supreme Court established what was in fact the test of navigability. The court's test of navigability has evolved from one of commercial uses to include recreational uses.

#### **C. HISTORY**

Development of our navigability concepts began with the "discovery" by England of lands in the New World.

The law pertaining to navigable water in Wisconsin and the problems arising from its application is difficult to understand unless one knows something of the legal history under which it was developed.

England claimed the lands which she held in the United States by the right of discovery. There were Indians upon the land but they were considered merely as temporary occupants, not owners of the land. England gave patents for large tracts of land to various companies, along with the right to administer the land.

The Revolutionary War between Great Britain and the thirteen original American colonies began on April 19, 1775. The Second Continental Congress of the colonies adopted the Declaration of Independence on July 4, 1776, and declared the United States a sovereign nation. The war with Britain lasted until September 3, 1783, when a liberal peace treaty established the American boundaries as far west as the Mississippi River. The original colonies became independent sovereign states and as such each had the right to make their own rules of law pertaining to the rights of the public and riparian land owners in the waters of the state.

Before the adoption of the United States Constitution, there was considerable discussion among the colonies as to what was to be done with the territory lying west of the colonies (the Northwest Territory). Virginia claimed what afterward became West Virginia, Connecticut, the greater part of Ohio, Indiana, Illinois, Michigan, Wisconsin and Minnesota. The states with no land claims, notably Maryland, felt that these lands had been wrested by common endeavor and sacrifice and therefore should belong to the Union. Virginia finally ceded the territory to the United States on two conditions. One was that the states to be formed out of the Northwest Territory were to be sovereign and independent states having the same rights of sovereignty as the original states. The other condition was that streams flowing into the Mississippi and the St. Lawrence Rivers and the carrying places between the same were to be forever free public highways. Congress accepted the cession on the terms laid down, and the conditions were incorporated in the Northwest Ordinance of 1787 which constituted the laws for government of the Northwest Territory. Hence, each state formed out of the Northwest Territory was entitled to make its own rules concerning the rights which the public and the riparian landowner had in the waters of the state. If the waters were navigable under the test adopted by the state, then they were free, public highways.

The condition that the navigable waters should be free public highways was of great importance to the original states. The rivers were the principal highways since there were no over-land highways into the wilderness. There were only three important routes of travel connecting the Mississippi Valley with the east. One of these was from Lake Erie up the Maumee River, a short portage to the Miami River and down the Ohio River. Another was from Lake Michigan by way of the Chicago River to the Mississippi River and the Des Plaines and Illinois Rivers. The third route was the Wisconsin-Fox waterway. This waterway was extremely important even before the canal was built. One firm employed thirty ox teams to transport the commodities across the narrow neck of land between the Wisconsin River and the Fox River.

The Northwest Ordinance provided that the navigable waters leading into the Mississippi and the St. Lawrence were to be free, public highways. There is nothing in the Ordinance or the Constitution of the United States which defines navigable waters. Each state was left to adopt its own definition of navigability.

Wisconsin was admitted as a territory on April 20, 1836, and the Wisconsin Enabling Act in Section 3 provides as follows:

And be it further enacted, That the said State of Wisconsin shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said State of Wisconsin, so far as the same shall form a common boundary to said State and any other State or States now or hereafter to be formed or bounded by the same; and said river and waters, and the navigable waters leading into the same, shall be common highways and forever free as well to the inhabitants of said State as to all other citizens of the United States without any tax, duty, impost or toll, therefor.

Even before gaining statehood, the Territorial Legislatures of 1840 and 1841 considered the waters of the territory of such importance in the development and well being of the territory as to require protection and regulation. The first statutory definition of navigability in Wisconsin, Act No. 9, was adopted by the Territorial Legislature of 1841 and provided:

That all rivers and streams of water in this territory in all places where the same have been

meandered and returned as navigable by the surveyors employed by the United States Government are hereby declared navigable to such an extent, that no dam, bridge, or other obstruction may be made in or over the same without the permission of the legislature.

The Territorial Legislature of 1840 by Act No. 48 enacted the first Milldam Act (now ss. 31.31 - 31.34). The act authorized the owner of a dam site on a navigable stream to build a dam in the stream and to flood the lands of others without their consent, subject only to the payment of damages. The purpose of the Milldam Act was to encourage the construction of gristmills, sawmills, and other mills by permitting the flowing of the lands of others without going through the slow process and delay of acquiring flowage easements for the mill pond.

The act admitting the state of Wisconsin into the Union on March 4, 1849 (approved May 29, 1849), reads in part as follows:

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the State of Wisconsin be, and is hereby, admitted to be one of the United States of America, and is hereby admitted into the Union on an equal footing with the original States, in all respects whatever, ...

In the act admitting the state of Wisconsin into the Union the provision that the navigable waters shall be public highways was omitted. However, the Constitution of the State, adopted by the Territorial Convention on February 17, 1848, and approved by the act admitting Wisconsin into the Union, contains the following provisions:

...and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the State as to the citizens of the United States, without any tax, impost or duty therefor. (Article IX, Section 1.)

Such parts of the common law as are now in force in the territory of Wisconsin not inconsistent with this Constitution shall be and continue part of the law of this state until altered or suspended by the legislature (Article XIV, Section 13).

The 1840 Milldam Act was amended 1853 (Chapter 72) and in 1858 (Chapter 41) to read as follows:

Section 2. All rivers and streams of water in this state, in all places where the same have been meandered, and returned as navigable by the surveyors employed by the United States government, are hereby declared navigable to such an extent that no dam, bridge, or other obstruction may be made in or over the same, without the permission of the legislature: provided, that nothing herein contained shall be construed so as to affect any act now in force granting to towns, or county boards of supervisors, the power to erect or authorize the construction of bridges across such streams.

Section 3. The boundaries of lands adjoining waters, and the several and respective rights of individuals, the state, and its citizens in respect to all such lands and waters, shall be determined in conformity to the common law, so far as applicable, as evidenced by judicial determinations in other states, in which the courts in such cases have adhered to its principles.

In 1853 the Legislature took a further step in the formation of the state policy with respect to waters of the State by adopting Chapter 72, Laws of 1853. This law declared that the common law of England, in so far as it may be applicable, shall be the law of Wisconsin in "determining" the boundaries of lands adjoining waters and the respective rights of individuals, the State, and its citizens in respect to all of such lands or waters.

Since the State of Wisconsin has no tidewater, the English test of the flow and ebb of tide was repudiated and the test of navigability in fact was adopted. When the question of "what constitutes a navigable stream" came before the courts, logs had been floated down many streams in the State for many years and that fact held great weight in the courts' decisions.

In the first Wisconsin Supreme Court case on "what is a navigable stream" which involved the obstruction to rafts of lumber on the Oconto River by a mill dam, the court held that the fact that a stream was meandered and returned as navigable by the U.S. Surveyors was not the test of navigability. The Court held that the effect of the statutes was not to declare that meandered streams were navigable in fact but only navigable to the extent that no obstruction could be placed in them without consent of the legislature (Jones v. Pettibone, 2 Wis. 225 (1853)).

A few years later in Whisler v. Wilkinson et al, 22 Wis. 546 (1868), the court held that the rivers of the state capable of floating the products of the country, such as logs, rafts, and lumber, were by common law public highways.

A few years later in Olson v. Merrill, 42 Wis. 203 (1877), the question arose whether Levis Creek, a nonmeandered stream in Jackson County, was navigable. The case states the following:

In 1863, before the logs were driven, there was brush across the creek, and alders on each side, and it had formed alder tow-heads. Without the improvement that was put on, we could not have run a log down. ... You could not see any creek, on account of the brush and alders; ... and some cuts had to be made, as a sixteen-foot log would not swing around in some places unless there was a cut made.

It also appears that men were stationed on both banks of the stream to keep the logs moving. The stream could not be used for log driving at a low stage or even at ordinary stage of water but only during "rises" which usually occurred three or four times each year - in the spring and summer. Such rises varied in duration from 4 to 13 days.

The court held the creek to be navigable, declaring:

...We deem it essential to the public interest in the pine-growing regions of the state, spoken of in Whisler v. Wilkinson, supra, to adopt the rule collected from the authorities in Angell on Watercourses, Sec. 537, and substantially adopted in the charge of the court below: Nor is it essential to the public easement that the capacity of the stream, as above defined, should be continuous; or, in other words, that its ordinary state, at all seasons of the year, should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement.

In 1858 the legislature reenacted the 1840 Milldam Act in an attempt to codify the law regulating the multitude of dams which had been erected under the 1840 Act and by special acts (private franchises) in the interim. The law allowed that "any person may erect and maintain a water mill and dam to raise water...across any stream that is not navigable...."

Quickly the question "what is a nonnavigable stream" as used in the Milldam Act came before the Supreme Court.

In Wood v. Hustis, 17 Wis. 429 (1863), the court held that "the words 'any stream that is not navigable,' in the milldam law were designed to exclude not only streams which are navigable in fact, but such as have been legally

declared public highways."

In Allaby v. Mauston Electric Service Co., 135 Wis. 345 (1908), the court held that the test of navigability under the Milldam Act is not the same as the test of navigability with reference to determining whether a stream is a public highway (waterway). The court said:

In view of the extent to which this court has gone in declaring streams navigable in the sense that they are not public highways, it is obvious that the word was used in this statute in a very different signification. ...A stream so petty that a saw log or a skiff cannot be floated upon its waters in the manner described in Olson v. Merrill, supra, would certainly yield no water power of any practical value to appliances such as were common in 1840.

The following streams were held to be nonnavigable within the meaning of the Milldam Act: the Lemonweir River at Mauston having 550 square miles of drainage area (Allaby v. Mauston Electric Service Co., (1908) 135 Wis. 345); the Apple River at Somerset having 450 square miles of drainage area (McDonald v. Apple River Power Co., (1916) 164 Wis. 450); and the Yahara River at Madison locks having 251 square miles of drainage area (Clute v. Briggs, (1868) 22 Wis. 579).

In Willow River Club v. Wade, 100 Wis. 86 (1898), the court determined the navigability of Wisconsin rivers was found in the navigable capacity - "those rivers are public navigable rivers in law which are navigable in fact." Further the court held that rivers which are navigable in fact are used or are susceptible of being used for "useful commerce and transportation of persons and property thereon." This case also ruled that although the title to the bed of a navigable stream is in the riparian owner(s) the river is held in trust for the use of the public and the right to fish in such a stream is a "right common to the public and one who keeps within the limits of the stream may exercise such right without being guilty of trespass."

The Legislature in 1895 enacted Chapter 328 pertaining to meandered lakes, which read as follows:

Section 1. All lakes within this state, which have been meandered and returned as navigable by the surveyors employed by the government of the United States, or which have been so meandered and are navigable in fact, are hereby declared navigable and public waters, and all persons shall have the right and privileges thereon, and thereto, to the same extent and with like effect as in, to, and over, and upon all other navigable or public waters within this state; provided, this act shall not affect pending litigation or interfere with any vested rights that have heretofore been acquired upon any such lakes or streams.

Section 2. All acts and parts of acts inconsistent or conflicting with this act are hereby repealed.

Similar to the rulings for streams, the court in 1912 (Bixby v. Parish, 148 Wis. 421) ruled that the test of navigability for lakes was the same for streams - navigable in fact.

By 1900 log driving had practically ceased. The forests were denuded not only of the floatable pine timber but to a great extent of the hardwoods. Many of the small water powers which turned the machinery of gristmills and sawmills and other mills, as they required major repairs, were being abandoned. It was cheaper to purchase power from a high voltage transmission line as these were gradually extended to different parts of the State. The recreational industry was gradually supplementing the lumbering and it demanded the strict interpretation of the new definition of "navigable streams," - that is, a stream "navigable for any purpose whatsoever." Private fishing and hunting grounds common in the late 1800s, were frowned upon and navigable water may not be used for those purposes.

From 1836 to 1910 the Legislature had granted 665 franchises for the construction of dams for various purposes,

such as the development of power, improvement of navigation, to facilitate log driving, booms, or pisciculture, to feed canals, to create ponds, to flow cranberry marshes, for the "public good," and for general municipal purposes. During the same period many dams had been constructed under the Milldam Act.

Besides the foregoing, many franchises were granted for the construction of bridges, levees, canals, etc.

In 1909 the Legislature appointed a Special Legislative Committee to study water power, forestry, and drainage, and report the same with its recommendations to the 1911 Legislature. No franchises were granted after the appointment of the special legislative committee. The report of the committee resulted in the so-called Water Power Acts of 1911, 1913, and 1915.

Under those acts, the Wisconsin Railroad Commission (now DNR) was given exclusive jurisdiction and power to issue permits for the construction of dams in navigable water, certain jurisdiction over dams constructed under the Milldam Act, and the numerous problems arising from obstructions in navigable water.

There were various reasons for this delegation of power, the foremost of which was to provide for the recapture by the State of the so-called "white coal" or water power. It was believed that the State should share in the benefits of the potential power which resides in falling water which could only be captured by the consent of the state.

Other reasons for the delegation of power were that the legislature no longer had time nor sufficient knowledge to study the plans for dams or to supervise their construction, and the failure of a dam might cause loss of life and damage to property, as was the case in 1911 when the Reservoir Dam and the Hatfield Dam in Black River failed and caused the destruction of most of the business section of the city of Black River Falls.

The Water Power Laws of 1911 and 1913 contained certain provisions which were determined to be unconstitutional, resulting in the enactment of the 1915 Water Power Law, under which the Department is now acting.

The first water power act, Chapter 652, Laws of 1911, amended the definition of "navigable streams" contained in Section 1596, Wisconsin Statutes of 1898:

The rivers and streams which have been meandered and returned as navigable by the surveyors employed by the government of the United States are hereby declared so far as the same have been meandered, to the extent that no dam, bridge or other obstruction shall be made in or over the same without permission of the legislature....

It was amended to read:

Section 1596(1). All rivers and streams which have been meandered and returned as navigable by the surveyors employed by the government of the United States and all rivers and streams meandered or nonmeandered which are navigable in fact for any purpose whatsoever are hereby declared navigable to the extent that no dam, bridge, or other obstruction shall be made in or over the same without permission of the legislature... (Now s. 30.01(2)).

The amendment wrought a far-reaching and important change in the statutory definition of the term "navigable streams," but the courts have not, so far as we have been able to ascertain, interpreted the meaning of the phrase "navigable in fact for any purpose whatsoever." The amendment was doubtless intended to bring into the navigable class many streams which were nonnavigable under the old statutory definition.

The Milldam Act uses the negative of the definition of navigable streams. Section 3374, Statutes of 1898,

provided:

Any person may erect and maintain a water mill and a dam to raise water for working it upon and across any stream that is not navigable upon the terms and conditions and subject to the regulations hereinafter expressed.

By Section 1, Chapter 533, Laws of 1911, the foregoing section was amended to read:

Section 3374. Any person may erect and maintain a water mill and a dam to raise water for working it upon and across any stream that is not navigable in fact for any purpose whatsoever upon the terms and conditions and subject to the regulations hereinafter expressed.

In Chapter 31 (Water Power Law), under the heading "Definitions," s. 31.01(2), it is provided as follows:

"Navigable waters" means all waters declared navigable by Chapter 30 of these statutes.

Thus, since the 1911 amendment, streams fall only in two classifications, namely, those which are navigable in fact for any purpose whatsoever and therefore public for log driving and other lawful purposes, and those which are not navigable for any purpose whatsoever and therefore private.

The amendment wiped out the technical meaning which the courts had applied to the term "nonnavigable" in the Milldam Act. Since the amendment a milldam may only be constructed in a stream not navigable for any purpose whatsoever subject only to the supervision and control of the Department.

The Milldam Act (Chapter 146, Statutes of 1915) and the Water Power Law (Chapter 69m, Statutes of 1915) were renumbered, revised, by Chapter 474, Laws of 1917 to form Chapter 31 of the Statutes.

Several judicial actions have occurred since that time which materially influence navigability concepts.

In Muench v. Public Service Commission 261 Wis. 492 (1952) the Wisconsin Supreme Court broadened the test of navigability to include recreational use of water as a criteria. The stream involved was navigable by the sawlog test and the test of navigability was not an issue before the court. Nevertheless, the court reviewed the law of navigability as stated in Wisconsin decisions and concluded:

The right of the citizens of the state to enjoy our navigable streams for recreational purposes, including the enjoyment of scenic beauty, is a legal right that is entitled to all the protection which is given financial rights.

Our holding in this respect is in keeping with the trend manifested in the development of the law of navigable waters in this state to extend the rights of the general public to the recreational use of the waters of this state, and to protect the public in the enjoyment of such rights.

Considering the 1911 amendment which the court said was very similar to the wording of the statute then in effect, the court declared:

Therefore, since 1911 it is no longer necessary in determining navigability of streams to establish a past history of floating of logs, or other use of commercial transportation, because any stream is "navigable in fact" which is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes.

The court apparently felt that the 1911 amendment's addition of the words "navigable in fact for any purpose

whatsoever" provided the basis for its conclusion that the definition of navigability had been broadened.

The most recent "guidance" on how navigability is determined is found in DeGayner & Company Inc., v. Department of Natural Resources, 70 Wis. 2d 936 (1975). While the case basically restated Olson v. Merrill, supra, the following major principles of law were set forth or reaffirmed by the Court:

1. "A stream need not, however, be in its 'normal or natural condition' when navigability is determined." The Court states throughout its decision that navigability may be determined during recurring periods of high water such as spring floods. The Court approved the Department order's assessment that periods of high water of a regularly recurring annual nature were sufficient to declare Five Mile Creek navigable-in-fact.
2. The Court concurred with the Department order's conclusion that the existence of beaver and their dams on Five Mile Creek was a "normal and natural" condition of Five Mile Creek. The facts established the presence of beaver for at least thirty-seven years. Also while individual dams did not remain intact for more than a few years, the evidence established that the beaver constantly built and rebuilt dams in the stream. The Court concluded that the existence of beaver on the stream was not transitory.
3. Regardless of whether the beaver dams were a natural condition, the Court approved the lower court conclusion that it is irrelevant whether the circumstances creating navigability are natural or artificial. Citing several cases the Court stated: "(t)his court has frequently held that, where artificial conditions create navigability, the stream is navigable in fact where such conditions have existed for a period of time."

In recent years the legislature has taken several actions which attempt to limit our jurisdiction on certain waterways. The actions did not attempt to redefine navigability but only attempted to exclude certain waters which are navigable from our authority to regulate.

Because of farmers' concern over obtaining dredging permits, the 1977 Legislature amended s. 30.10(4) to limit Department jurisdiction over drainage ditches in organized drainage districts. The legislature declared all such ditches not navigable insofar as the application of Chapter 30, except where it could be shown that the ditches were navigable streams before ditching or had a previous stream history. However, in deciding State of Wisconsin v. Francis Dwyer, 91 Wis. 2d (Ct. App.) 440 (1979), the court said that a dredging permit was needed in any stream - navigable or not.

Most recently, the legislature (1981) amended s. 30.10 to change the definition of navigability of farm drainage ditches. The 1977 subsection (30.10(4)(c)) applied only to drainage ditches in drainage districts established under Chapter 88. The present subsection applies to any farm drainage ditch regardless of whether or not it is in a drainage district. It also states that farm drainage ditches are not navigable unless they are shown to have been navigable streams before "ditchery." The former version of the law allowed the Department to declare a drainage ditch navigable if it had a previous stream history (navigable or nonnavigable). Chapter 120 on dredging provides further details.

## **OWNERSHIP OF STREAM AND LAKE BEDS**

Determination of ownership of a streambed or lakebed may have various consequences. In Wisconsin the beds of streams, whether navigable or nonnavigable, are owned to the middle or thread of the stream by the owners of the adjacent shorelands. Beds of natural navigable lakes are owned by the State (Bigsby v. Parish, 148 Wis. 421 (1912)). Private ownership of the bed of a navigable stream has always been subject to the overriding public right of navigation and to other public rights in navigable waters. (Munninghoff v. Wisconsin Conservation Commission, 255 Wis. 252 (1949)). The Wisconsin Supreme Court has repeatedly used strong language to



underline its support of the public rights in navigable waters.

The ownership of the bed underlying a man-made lake or reservoir formed by damming a stream or otherwise impounding a natural flow of water remains in the hands of the abutting landowner unless it was purchased. Even though a lake now exists, bed ownership is determined as though the previous existing stream still remains. The public has the same rights in a flowage as it does in a navigable stream.

The Wisconsin Supreme Court has held that the State owns the beds underlying natural navigable lakes and ponds. Although the language of early Wisconsin cases did not specifically designate the State's ownership as a trust title, later decisions describe the State's ownership as sovereign and in trust for the public for navigation and its various incidents. This trust arising out of the incidents of navigation not only permits public use where access is available but also allows the State to regulate the types of activity that may occur on the surfaces of the water.

Riparian rights exist by virtue of ownership of the bank or shore in contact with the water. The Wisconsin Supreme Court, in Doemel v. Jantz, 180 Wis. 225 (1923) stated:

... the following principles therefore appear to be firmly established by the jurisprudence of this state and of other states so as to become a part of the common law:

1. The rights of riparian owner are based upon his title to the ownership of the banks or the uplands.
2. Such ownership gives him exclusive privileges of the shore for the purpose of access to his land and the water.
3. The privileges are valuable privileges incident to his title to the land of which he cannot be deprived for any private use, and which the public can only acquire from him by purchase, prescription, or by the exercise of the right of eminent domain.
4. That such rights include the right of using the shore for the purposes of building piers, wharves, harbors, or booms in the aid of navigation, and of building walls or other protection so as to prevent loss of soil by the process of erosion....

These principles deduced from the cases are so firmly established as to be invulnerable to attack.

These precepts have been reiterated by the Court on numerous occasions. In Munninghoff v. Wisconsin Conservation Commission, 255 Wis. 252 (1949) the Court stated:

In Wisconsin, the owner of the banks of the stream is the owner of the bed... The owner of the submerged soil of a running stream does not own the running water, but he does have certain exclusive rights to make a reasonable use of the water as it passes over or along his land. For instance, he may erect a pier for navigation.... The riparian's exclusive right to use the water arises directly from the fact that nonriparians have no access to the stream without trespass upon riparian lands.

Under Wisconsin common law, therefore, only a riparian owner has "certain exclusive rights to make a reasonable use" of the water and the shoreline on the riparian property. This "exclusive use" of the riparian property is subject, however, to the paramount interest of the public which is protected by the "trust doctrine."

The legislature has authorized incursion by a riparian owner into this public trust area subject to the limitations and procedures contained in Chapters 30 and 31. See Town of Ashwaubenon v. PSC, 22 Wis. 2d 38 (1963).

### ***Other Items Related to Stream and Lake Bed Ownership.***

Riparian owners may separate the ownership of the stream bed from the ownership of the abutting lands.

Riparian rights are "freely alienable and may be separated from upland ownership" (Mayer v. Gruber, 29 Wis. 2d 168 (1965)) and thus riparian rights can be sold or leased.

Another "right" of riparian ownership (designed to preserve the riparians access to the water) is the title to the land formed by gradual and natural accretions (see Doemel v. Jantz 180 W. 225 (1923)).

## **FEDERAL NAVIGATION THEORY AND DETERMINATIONS IN WISCONSIN**

Section 17 of the book "Water-Use Law and Administration in Wisconsin" by Ellis Beuscher, Howard, & DeBral includes a thorough examination of the federal navigation doctrine and source of federal authority to develop or regulate navigable waters. A full appreciation of the development of federal authority can be gained by reviewing that section. The following comments discuss the principal aspects of federal authority.

The primary federal regulatory authority is based on Article 1, Section 8, clause 3 of the United States Constitution, which established the congressional power "to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." Navigation, long recognized as an essential part of commerce, was thus brought within the powers of Congress. Federal regulatory jurisdiction is usually defined in terms of "navigable waters," a phrase which originally referred to a waterbody's physical capacity to carry waterborne commerce. Thus, the early courts found rivers to be navigable:

when they are used, or are susceptible of being used . . . as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. (The Steamer Daniel Ball v. United States, 77 U.S. (10 Wall.) 557, 563 (1871)).

Navigable waters of the United States are those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce. A determination of navigability, once made, is not extinguished by later actions or events which impede or destroy navigable capacity.

With the River and Harbor Act of 1899, Congress established the U.S Army Corps of Engineers' authority as a regulatory agency. The law was passed to insure that water commerce routes would be kept operable and free of obstructions to navigation. Section 10 of the act requires that permits be obtained from the Corps for dredging and for the construction of piers and other structures which could affect navigation. The 1899 law limited the agency's permit jurisdiction to navigable waters of the United States.

In 1972, Congress expanded the Corps' regulatory jurisdiction with the passage of amendments to the Federal Water Pollution Control Act. Section 404 of the amendments made it illegal to place fill or dredged material in "waters of the United States" without a Corps permit. The Corps interpreted the new legislation as applying to the same waters as the 1899 law.

However, the Natural Resources Defense Council took the matter to court, arguing that Congress had intended the Corps to exert jurisdiction over a much greater area. In 1975 the district court for the District of Columbia found in favor of the NRDC and directed the Corps to publish new regulations to extend its regulatory authority. Thousands of square miles were brought under the Corp's jurisdiction.

To implement the federal court decision, the Corps wrote regulations to expand the Section 404 program in three

phases. Phase 1 was instituted in July 1975. It required permits for the placement of dredged or fill material in navigable waters of the United States as defined in the 1899 River and Harbor Act plus wetlands adjacent to those waters. Under the second phase, which became effective in the fall of 1976, the program was extended to include primary tributaries of navigable waters as far as their headwaters. Headwaters means streams with a normal flow of at least five cu. ft. per second. Lakes larger than five acres with surface outlets that ultimately drain into navigable waters also were included in the program.

The third phase of expanding jurisdiction brought all waters with a flow of five cu. ft. - adjacent wetlands included - under the Section 404 program in 1977. That same year, Congress passed the Clean Water Act. That law superseded the Federal Water Pollution Control Act, incorporating Section 404 with minor revisions.

Today, the primary features of the Corps' permit program are governed by Section 404 of the Clean Water Act and Section 10 of the River and Harbor Act of 1899. The Section 10 program requires that a permit be obtained from the Corps before dredging or building in water that support interstate or foreign commerce ("navigable waters of the United States"). Section 404 regulates only the discharge of dredged or fill material in "waters of the United States."

The U.S. Army Corps of Engineers (Corps), the U.S. Coast Guard and the Federal Energy Regulatory Commission (FERC) regulate activities in federally navigable waters. The U.S. Environmental Protection Agency (EPA) and the U.S. Fish and Wildlife Service often comment or otherwise cooperate in federal water regulation.

The FERC licenses hydropower projects throughout Wisconsin. The FERC may require a license for a dam even on federally nonnavigable streams if the dam could affect interstate water commerce.

The EPA has jurisdiction over all waters for purposes of pollution control on the theory that pollution of any water will eventually find its way into federal navigable waters. The Department administers the pollutant discharge elimination system (WPDES) program on behalf of the EPA. A permit is required for discharges into any "waters of the state." "Waters of the state," as defined in Chapter 147, Wis. Stats, is completely different than navigable waters, either federal or state.

Manual Code 1462.2 explains how the state and federal water regulation programs are related. The Manual Code includes a list of federal navigable waters as classified by the Secretary of the Army.

## **PROCEDURE**

### ***In the field.***

The best evidence of navigability is whether a lake or stream is navigable-in-fact. Using the direction in DeGayner v. D.N.R., 70 Wis. 2d 936 (1975), a stream is navigable-in-fact if it is navigable by canoe or skiff on a reoccurring basis (i.e. annually during freshets) and has a discernable bed and banks.

The test of navigability is whether you can float a canoe or duck skiff down the stream. Obstacles or interruptions to navigation such as brush, fallen trees, tight meanders, do not make a stream not navigable-in-fact by themselves. Remember that Lewis Creek (subject of Olson v. Merrill, supra.) was found to be navigable-in-fact even in light of the fact that it was (and still is) such a winding, twisting, alder covered creek that the logs being driven down it couldn't make some of the bends and were continually hanging up in the alders. Take thorough notes and gather information that will help support your determination:

1. Size of the boat or canoe. Your weight and that of any partners. Your starting and ending points, date, startup and finishing time.
2. The water level. Use the top of a bridge, culvert or other permanent reference point; measure level at

start and finish of floating.

3. The relation of the water level to the ordinary high-water mark (OHWM) (see Chapter 40 for instructions on finding the OHWM).
4. Estimated or measured flow.
5. Photographs-particularly with navigator in boat at narrow, normal, and obstructed sites.
6. Any interruption or obstacles to navigation such as fallen trees, brush, etc.

***Other sources of navigability determinations.***

Previous determinations of navigability provide evidence of the recurrence of navigability. They are found in the following sources:

1. Court declaration of navigability.
2. Legislative designation of navigable waterways.
3. Previous navigation-in-fact "shocker surveys," available at Area, District and Central Offices.
4. Previous navigability determinations on file at district offices and the Bureau of Water Regulation and Zoning, Madison DNR. Note: nonnavigable determinations made before DeGayner (1975) may NOT be controlling.
5. Public highway declarations by Town Boards.
6. U.S. Corps Engineers or Coast Guard (and possibly Federal Energy Regulatory Commission) listings.

## **EDUCATION**

"Public or Private I - Navigability" brochure - Pub. 5-3500(82)

1259H.PERM

**CORRESPONDENCE/ MEMORANDUM**

**STATE OF WISCONSIN**

DATE: July 19, 1984

3550 (WMC)

TO: District Directors

PMMS Response

Put in: Chapter 30, Water Regulation Handbook

FROM: Robert W. Roden - WRZ/5

Distribution: All Program Staff

SUBJECT: Access to Waters from Road R.O.W.

We have been asked if access to waters of the state from public road right-of-ways is limited to those lands held in fee title by a body of government and if public access to waters of the state could be denied in cases where the highway R.O.W. is obtained by easement or lease agreements.

This question is addressed in Walker v. Green Lake County (1955), 269 Wis. 103 which provided that access to navigable waters is a proper public highway use and that it would be obtained even when the fee title is not held by the governing body. This decision was also commented on positively in 52 OAG 161 (1963).

Therefore, public access to navigable waters of the state is not limited to those cases where the land is owned in fee title by the governing body. Such access may not interfere with the use of the highway by the public generally and may be limited in the case of a controlled-access highways pursuant to 83.027 and 84.25 Wis. Stats.

Reviewed By:

John Coke

Michael Cain

RWR:msg

5823H

**CORRESPONDENCE/ MEMORANDUM****STATE OF WISCONSIN**

DATE: January 10, 1986

FILE CODE: 3550

TO: District Directors (WMC)

PMMS Response

Insertion: Water Regulation Handbook Chapter 30

FROM: Robert W. Roden - WZ/6

Distribution: Program Staff

SUBJECT: Definition of "Obstruction to Navigation"

A question has been raised about what action the Department can take when a person lawfully wading a stream has been physically threatened by owners of adjacent lands.

The various public rights relating to navigation and its incidents were established over time through court actions resulting from the attempts of landowners to prosecute for trespassing individuals who were undertaking these activities within the confines of a navigable body of water (example cases include *Willow River Club v. Wade* and *Diana v. Husting*.). It is clear under common law, therefore, that as long as the individual remains within the area where water currently exists ("keep your feet wet"), there is no valid legal basis for a landowner to prevent these activities from occurring. The primary exception is that trapping is not a legally protected public right if the trap is anchored to the bed of the waterway (*Munninghoff v. Conservation Commission*).

Beyond the common law provisions, section 30.15, Stats., relates to obstructions of navigation. Subsection 30.15(1) provides, among other things, that any person who "unlawfully obstructs any navigable waters and thereby impairs the free navigation thereof" is violating this section. While subsection 30.15(1)(a) arguably is not restricted by any specific language within it to physical obstruction of the waterway, it is clear from the context of the remainder of the statute, that this is the intent. Beyond this, the Department and its predecessor agencies have not interpreted this statute as covering threats of physical harm or other attempts to impede the usage of a waterbody by a member of the public without placing some physical object, such as a fence, boom, or other device, into the waterway to obstruct navigation.

The only apparent legal recourses for this situation are: 1) a civil lawsuit by the citizen to obtain an injunction against the individuals who are interfering with his or her right to fish and wade the stream, or seeking after-the-fact relief such as bringing charges for assault and battery; and 2) a suit brought by the State to enjoin property owners from actions of this type. While the law is clear that a landowner has no legal basis for this type of interference with a constitutionally-guaranteed right, there is no guaranteed way of preventing this kind of harassment or assuring the safety of any individual.

RWR:hf

Reviewed By:

Scott Hausmann

Dale Simon

Michael Cain

cc: Mike Cain - LC/5

Ralph Christensen - LE/5

**CORRESPONDENCE/ MEMORANDUM****STATE OF WISCONSIN**

DATE: June 29, 1987

FILE REF: 3550

TO: District Directors

PMMS Response

Insertion: Chapter 30, Water Regulation Handbook

Distribution: Program Staff

FROM: Robert W. Roden - WZ/6

SUBJECT: Navigability of Isolated Ponds

We have been asked whether the DeGayner & Co., Inc. v. Department of Natural Resources, 70 Wis 2d 936(1575) decision can be used as a basis for determining the navigability of wetlands. The question was concerning isolated wetlands and floodplain wetlands affected by flooding but whose elevation is higher than the O.H.W.M. of a stream. For clarity in the following discussion we should view "wetlands" as a class or subset of the broader terms - lakes and ponds.

Although the DeGayner decision is one of many Supreme Court decisions dealing with questions concerning the navigability of streams, the general principles of "navigability" set forth in that case apply to lakes, ponds and other waterways as well. The DeGayner decision reiterated that "Navigability, then, is not to be determined by the 'normal' condition of the stream" and went on to establish that whether "the circumstances creating navigability were natural or artificial is irrelevant." In describing navigability, DeGayner said "the test is whether the stream has periods of navigable capacity which ordinarily recur from year to year, e.g., spring freshets, or has continued navigable long enough to make it useful as a highway for recreation o-r commerce."

In their evaluation of navigable waters in Water - Use Law and Administration, Ellis and Beuscher (1970) said the following. Although only the words 'navigable in fact' without the additional words 'for any purpose whatsoever,' are included in the statutory definition of lakes, it appears likely that the same test applies to determine navigability of lakes and streams." (at p. 42)

Another case having a bearing on lakes and ponds is Ne - pee - nauk Club v. Wilson, 96 Wis. 290, (1897). The evidence of that case showed: that the waters of a small stream spread into Mud Lake, 35 to 65 rods in width, and three miles in length, and then reappeared as a stream; that Mud Lake was covered with water in the spring, in the fall, and after heavy rains; that in the summer it was marshy and partially dry; that it was filled with rushes and wild rice; and that sometimes it could be navigated by small skiffs and canoes. Although Mud Lake was not navigable by any kind of boat through its entire length during the greater part of the year, the court concluded that it was a navigable lake.

The latest nonstream related court decision concerning navigability is State v. Bleck, 114 Wis 2nd 454 (1983). One of the issues presented for review in that case was "what are navigable waters?" The court determined...."that the term 'navigable waters' within the meaning of secs. 30.12 and 30.15, Stats., for the purpose of establishing the state's jurisdiction, are waters that are navigable in fact. Once the state has proven that the body of water is navigable in fact, it has established its jurisdiction under those statutes." Another argument made in that case was that the lake was artificial and private. The court analyzed this argument and concluded for a variety of reasons that the party objecting to the state's assertion of jurisdiction has the burden of proof to show that a body of water is artificial and private. The general presumption then, in question of navigability, should be that a body of water which is "navigable in fact" is natural and public. These two factors along with

various decisions indicating that the state's jurisdiction on navigable waters extends to the O.H.W.M. are about the sum and substance of legal interpretations on navigability of lakes.

The real issue to be considered when evaluating lakes and ponds (including wetlands) is whether they are "navigable in fact" by the above criteria. Although one might argue that there should be some minimum cut off size for a body of water to be considered navigable, any body of water capable of floating a canoe is valuable and should be considered navigable. To support this conclusion, consider the resource value associated with even a tiny spring pond or isolated wetland pond. They have fishery and/or wildlife values and preserving these values is in the public interest even if they are not readily accessible to the public.

Our experience has shown that the most critical factor in establishing the navigability of isolated wetland lakes (or ponds) is the establishment of historical information on the regularly reoccurring nature of the navigable capacity. If the photographic and cartographic evidence shows such reoccurrence, it is our opinion that the DeGayner analysis can be applied to lakes and will be sustained.

Prepared by: Bob Sonntag  
Requested by: Joe Kurz  
Reviewed by: Mike Cain  
Dale Simon



## **APPENDIX "F"**

### **RIVERS AND STREAMS DECLARED NAVIGABLE**

NAMES OF: Section 1607. The following rivers, having been heretofore so declared by acts of the Legislature, are hereby declared to be navigable to the extent thereof, stated respectively, as follows:

Big Plover River. In the Counties of Portage and Marathon; from the northern boundary line of T28,R10, to its mouth.

Coon River. In the County of Vernon; between the Village of Chaseburg and the Mississippi River.

Eagle Creek or Waumandee River. In the County of Buffalo; from the mill erected by Gearkee and Binder for two miles or more to its mouth.

Fond du Lac River. From the forks thereof to its mouth.

Fox River. From Waukesha, in Waukesha County, to Waterford, in Racine County.

Kinnickinnick River. In the County of Milwaukee; so much as runs through the NE<sup>o</sup> of S8 in the town of Lake.

Little Wolf River. In the County of Waupaca.

Mecan River. In the County of Marquette; from the dam in S7,T16,R11, to its junction with the Fox; subject to the limitations contained in Chapter 328, Private and Local Laws of 1866.

Pine River and its tributaries. In the County of Richland.

Rock River. As high up as T14,R15.

West Twin River and its tributaries. In the Counties of Brown and Manitowoc.

Wolf River. In the County of Kewaunee; so much as lies in T25 and T26,R25.

And the following navigable for driving logs:

Black Creek. In the County of Outagamie; in T23 and 24,R17 and T24, R18.

Duck Creek. In the County of Outagamie; in T22 and T23,R17; T22,R18.

Kewaunee River. In Kewaunee County.

Kickapoo River, the west branch thereof. In the County of Vernon; from the north line of T12, R3, to its junction with the main Kickapoo, for rafting lumber and timber.

Maple Creek. In the Counties of Waupaca and Outagamie; in T23,R14; T23,R15.

Rib River. In the County of Marathon; from Big Rib Falls in T29,R5, to its 14th for logs, timber and lumber.

Rush River. In the County of Pierce; from Thompson's mill in the town of Martell to its mouth.

Scarbrow Creek and School Creek. In the County of Kewaunee.

Shiocton River and its tributaries. For logs and timber.

Waupaca River. In the County of Portage; from the mills of Jerome Nelson in the town of Amherst to its crossing of the range line between ranges nine and ten for logs, timber and lumber.

But this Section shall not affect or impair any of the acts of the Legislature specially relating to any of said streams.

The revisers of 1878 said of this section: "This is a recapitulation in brief of the acts heretofore passed, and still unrepealed, declaring rivers to be navigable. It is a matter of public and general law, and it has seemed desirable to collect and present together a recapitulation of the legislation on the matter. The acts mentioned contain various provisions, differing among themselves, relating to bridges, mills and mill-dams already built, to punishment for obstructions, and the like, which it has not seemed proper to incorporate. The only legislative acts on the subject of the section which the revisers have been able to find are:

1. As to Baraboo River: Ch. 61, P. & L. 1853, declaring it navigable from east line of T13N, of R1E, to its mouth, which was repealed by Ch. 225, 1875.
2. Big Plover River: Ch. 73, P. & L. 1853, amended by Ch. 100, 1864.
3. Black Creek: Ch. 214, P. & L. 1866.
4. Coon River: Ch. 315, 1876.
5. Duck Creek: Ch. 48, P. & L. 1866.
6. Eagle Creek: Ch. 14, P. & L. 1855.
7. Fond du lac River: Ch. 104, 1849.
8. Fox River: Ch. 358, P. & L. 1868.
9. Kewaunee River: Ch. 288, P. & L. 1868.
10. West Branch of Kickapoo River: Ch. 250, 1875.
11. Kinnickinnick River: Ch. 115, 1876.
12. Little Wolf River: Ch. 372, P. & L. 1853.
13. Maple Creek: Ch. 353, 1865.
14. Mecedon River: Ch. 328, P. & L. 1866. This act contains several peculiar provisions.
15. Pine River: Ch. 205, P. & L. 1853.
16. Rib River: Ch. 563, P. & L. 1866.

17. Rock River: No. 49, 1839.
18. Rush River: Ch. 40, 1863.
19. Scarbro and School Creeks: Ch. 288, P. & L. 1867.
20. Sheboygan River was declared navigable from the outlet of Sheboygan Lake to its mouth by Ch. 366, P. & L. 1855; amended by Ch. 221, P. & L. 1857. by excepting that portion west of R23. The acts repealed by Ch. 141, P. & L. 1859.
21. Shioc River: Ch. 84, 1868.
22. Waupaca River: Ch. 170, 1874.
23. West Twin River: Ch. 175, P. & L. 1866.
24. Wolf River: Ch. 90, P. & L. 1855.

It will be observed that some rivers are declared 'navigable' and public highways; others navigable for logs, or for lumber and timber. Different consequences probably follow, as all rivers that are in fact navigable for logs, timber and lumber require no legislative declaration to make them so, and that declaration amounts to no more, perhaps, than proof of the fact.

Rights on meandered lakes. Section 1607a. All lakes wholly or partly within this state which have been meandered and returned as navigable by the surveyors employed by the government of the United States or which have been so meandered and are navigable-in-fact are hereby declared to be navigable and public waters, and all persons shall have the right to pass to and fro, be and remain thereon and have and enjoy all other rights and privileges thereon and thereto to the same extent and with the like effect as in, to, over and upon any other navigable or public waters; provided, that this section shall not affect actions pending on the first day of May, 1895, or interfere with any rights theretofore acquired.

Chapter 328, 1895, extended by adding "or partly" and inserting date of approval of act.

v:\perm\wz91259h.djd

[Questions & Answers on Stream Access removed 9/01, due to budget legislation.]

**CORRESPONDENCE/ MEMORANDUM**

**STATE OF WISCONSIN**

*Date:* March 4, 1988

*File Ref.* 3500

*To:* District Directors (WMC)

*Insertion:* Chapter 30, Water Regulation Handbook

*Distribution:* All Program Staff

*From:* Scott Hausmann - WZ

*Subject:* Public vs. Private Rights on Flowages. Minnow Trapping

Attached is a letter concerning public versus private rights on flowages and a letter concerning minnow trapping regulation.

SH:el  
Attach.

Carroll D. Besadny  
Secretary  
BOX 7921  
MADISON, WISCONSIN 53707

February 25, 1988

IN REPLY REFER TO: 8300

Mr. Raymond Roder  
Whyte & Hirschboeck  
44 East Mifflin Street  
Madison, WI 53703

Subject: Private Rights in Gregerson Lake, Waupaca County, WI

Dear Mr. Roder:

The file concerning the questions of the rights of the public versus the riparian proprietors on Gregerson Lake, Waupaca County, WI, has been referred to me for review.

Based on the facts submitted by you and representatives of the Department's Oshkosh area office, it appears clear that Gregerson Lake is a flowage, rather than a natural lake. The bed of Gregerson Lake is therefore in private ownership. The owners may be the adjacent riparians or may be another party if such other party holds record title to the flowed lands.

Your letter indicates that Elmer Beier is the owner of record for a portion of the bed of Gregerson Lake and has paid taxes on that area. That ownership does give Mr. Beier some control over activities on Gregerson Lake. We are not, however, in total agreement with your letter of September 30, 1987, concerning the extent of the control exerted by riparian landowners on such a body of water.

We agree that Mr. Beier can exert control over trapping, including minnow trapping, where the traps are attached to the bed in the area of the flowage where he owns the bed. This conclusion is based on Munninghoff v. Wisconsin Conservation-Commission, 255 Wis. 252 (1949), which concluded that the anchoring of traps on privately owned stream or lake bed is a trespass and is not an incident of navigation.

We also agree that Mr. Beier could limit "ice cutting" on the area bounded by his bed ownership where the purpose of the ice cutting is the removal of the ice from the premises. There is case law in Wisconsin from the period when commercial ice cutting was an important business which indicates that the owner of the bed also holds title to the ice and is entitled to recover the value of ice removed from the area by another person without the owners permission. See Haase v. Kingston Cooperative Creamery, 212 Wis. 585 (1933).

It does not follow from the above decisions that the landowners can limit activities on the water or ice surface nor does it follow from these cases that a landowner can restrict the cutting of ice holes which are incident to fishing. The Wisconsin Supreme Court noted both in Haase and Munninghoff that the public has full rights to use the water, the ice surface, and the bed of navigable lakes or streams for enjoyment of public rights. It is clear that a member of the public has full rights to enjoy the incidents of navigation on Gregerson Lake. Fishing, skating, and other uses of the water and ice are such public rights and cannot be limited or controlled by riparian owners.

I hope this addresses the concerns of your client. If you have additional questions, please feel free to contact me.

Sincerely,

Michael J. Cain  
Attorney at Law

cc: LMD

Steve.Sisbach - Oshkosh WZ/6

Pete Flaherty - LC/5

Mike Lutz - LC/5

MJC:js/8620I

*Carroll D. Besadny*  
*Secretary*  
BOX 7921  
MADISON, WISCONSIN 53707

File No. 8300

February 11, 1988

Mr. Robert Cyran  
Cyran's Live Bait  
736 N. Old Wausau Rd.  
Stevens Point, WI 54481

Dear Mr. Cyran:

Thank you for your recent letter, expressing your interests and questions regarding minnow trapping. I hope the following information can answer your questions.

Section 30.12, Wisconsin Statutes, requires that a DNR permit be obtained to place any structure, including a minnow trap, on the bottom of a navigable lake or stream. However, the issuance of a bait dealer's license by the Department (under Section 29.137 Wisconsin Statutes) satisfies the requirement for Departmental approval of minnow traps. Consequently, Section 30.12 Wisconsin Statutes permits will not be needed if you are operating under a valid bait dealer's license, unless the traps are larger than the standard size restrictions imposed by NR 20.10, Wisconsin Administrative Code (listed below). If you do not already have a bait dealer's license you can apply for one through:

DNR Area Headquarters  
Room 118, 1681 2nd Ave. S.  
Wisconsin Rapids, WI 54494  
Telephone: (715)421-7800

In the case of non-standard minnow traps you must have a bait dealer's license and obtain a permit for the nonstandard gear under Section NR 20.10(5), Wisconsin Administrative Code.

To avoid violating trespass law, lawful access to the water is needed, either through public access or permission from private landowners. Permission is also needed from private landowners to place a minnow trap in front of their property in a stream since a stream bed in Wisconsin is owned by the riparian landowners or owners of the stream's upland banks. If a minnow trap or traps rest on both sides of the mid-channel or thread of the stream then permission is needed from the landowners on both sides of the stream to avoid trespassing on their lands.

In lakes, to place minnow traps in shallow water permission is needed from the landowner whose land the trap is in front of to prevent an unauthorized infringement on the landowner's riparian rights. If the traps are placed in deeper water, beyond the line of navigability (beyond 4 feet in depth), then the traps can be placed anywhere in the lake as long as there is lawful access to the lake by public access or the permission of one riparian landowner.

Minnow traps shall not be longer than 24 inches or wider than 16 inches square, with an opening in the throat of the trap not greater than 1.5 inches in diameter, unless a permit has been issued by the Department for use of nonstandard minnow gear. S. NR 20.10, Wis. Adm. Code. Nonstandard gear permits are required for all "oversize" minnow traps set in both private, non-navigable waters as well as public navigable waters. These permits can also be applied for by contacting the aforementioned DNR area office.



I hope this information is helpful. If you have any further questions please contact the local water management specialist or myself.

Sincerely,

Peter Flaherty,  
Attorney at Law  
Bureau of Legal Services

cc: Hal Schwenn - FM/4  
Gary Homuth - LE/5

## CORRESPONDENCE/ MEMORANDUM

## STATE OF WISCONSIN

DATE: October 3, 1988            IN REPLY REFER TO: 3550

TO:    District Directors    (WMC)

PMMS Response

Insertion:    Chapter 30, Water Regulation Handbook  
Chapter 3&4, Floodplain & Shoreland to Dams Guidebook

FROM: Scott Hausmann

SUBJECT: Navigability of Appurtenances

Distribution:    WRZ Program Staff  
                      County Zoning Administrator  
                      Bur. of Legal Services

### ISSUES

When is the headrace, tailrace or other appurtenance to a dam considered navigable water? Are they considered enlargements or channel changes? Where is the ordinary high watermark?

The answers to these questions directly affect:

- Where the shoreland zone boundary and setbacks are measured from
- The application of water regulatory jurisdiction to activities in artificial waterways
- Dam safety and boating safety near dams

### SUMMARY OF CONCLUSIONS

Legally, the water passing through a dam or any appurtenance to a dam on a navigable waterway is considered navigable. DNR may allow or order the owner of a dam to restrict access or give warnings for safety or other public interest reasons. Separate Chapter 30 permits for activities in appurtenances to dams are not required so long as the dam is authorized. The public interest in and uses of appurtenances should be considered under Chapter 31 authorities and procedures. The shoreland zone is measured from the ordinary high watermark of the appurtenance unless there is no potential for runoff or other adverse impacts on the values that shoreland zoning protects in the appurtenance or the waterway to which it is connected.

### BACKGROUND

#### ***Determination of Navigable Status***

State ex.rel. Preigel v. Northern States Power Co. (242 Wis. 345) establishes two key points in this issue. First, the public retained the right to fish and navigate in waters diverted from a river into an earthen canal and wood stave pipeline. Second, the term dam is not limited to the part of the structure directly across the riverbed, but includes the entire development from flashboard to tailrace, millrace or canal carrying water to the powerhouse. In Preigel the court cited the rule established by Dwinel v. Barnard (28 Me. 554, 562) that one who forms a new channel to conduct the waters of a navigable stream automatically authorizes the public to use the new channel for the purposes of navigation to which the old channel was used or adapted.

#### ***Navigability, Public Use and Safety***

Public access and use need not be encouraged for all appurtenances even though they are navigable. In some situations, public use may be hazardous. Chapter 31.03(2) in general and NR 330 in particular authorize actions to protect public safety.

### ***The OHWM and the Shoreland Zone***

The OHWM may be found by usual means if the appurtenance has natural stream characteristics. For open channels of concrete, metal or other man-made material, the edge of the channel should be used as the OHWM.

The level, flow and quality of water and fish and wildlife habitat in open artificial waterways can be affected by construction and earth disturbing activities in the shoreland zone in the same way as a natural channel. If the channel is completely enclosed or is otherwise constructed so runoff from the adjacent land surface could not reach it, then shoreland activities would not likely have an impact. In such cases, the shoreland zone should be measured from the OHWM of the navigable waterway to which the artificial channel is connected.

### ***Application of Chapter 30***

Even though appurtenances to dams are navigable - and activities in them have potential impacts - separate Chapter 30 permits should not be required for individual actions below the OHWM of these waterways. The same protection provided by the Chapter 30 permit process can be provided under Chapter 31 procedures for construction, alteration or abandonment of dams. Public interest considerations, notice and hearing requirements are very similar.

Related Guidance: March 25, 1985 - Shoreland Zoning Jurisdiction.

Requested By: Bob Roden - WZ

Reviewed By: Scott Hausmann Larry Larson – WZ  
Michael Cain - LC

MEV:EB:el

**CORRESPONDENCE/ MEMORANDUM****STATE OF WISCONSIN**

Date: August 20, 1990

IN REPLY REFER TO: 3550

To: District Directors

PMMS Response

Insertion: Chapter 30 Water Regulation Handbook

From: Robert Roden - WZ/6

Distribution: WRZ Program Staff

Subject: Navigability Determinations

We have been asked several questions regarding navigability determinations related to the following situation: In 1977 several Department employees determined a portion of a stream to be nonnavigable. Since then the landowner channeled the stream and placed fill into adjoining wetlands and the floodplain. This action confined the flow to a channel estimated to average 3 feet deep and 3 feet wide, and observed (not proven) navigable during high water periods. This situation raises the following questions:

1). Q: May we now declare the stream navigable and assert Chapter 30 jurisdiction over future projects.

A: Two factors come into play in reaching an answer to this question. The first factor is the navigability standard in use at the time of the past determination of non-navigability. In this case the standard used is that of the most recent applicable Supreme Court Decision found in DeGayner & Company Inc., v. Department of Natural Resources, 70 Wis. 2d 936 (1975). Therefore, in this situation the question of navigability is based on the current standard and results in a proper determination that the stream was non-navigable. If, however, a past determination of non-navigability was based on pre-DeGayner standards it may be possible to prove, using DeGayner standards, that the stream is now navigable and subject to Chapter 30 jurisdiction for future projects.

The second factor to be considered is the applicability of the navigability standard based on s. 30.10, Wis. Stats. In 1981 s. 30.10, Wis. Stats. was amended to exclude "farm drainage ditches" from navigable waters unless it is shown the ditches were navigable streams before ditching occurred. Therefore, if the above situation involves an artificial channel which drains water from lands which are used for agricultural purposes and the past determination of non-navigability was based on the DeGayner standards the farm drainage ditch exclusion would apply and the stream would not be subject to our jurisdiction in the future even though it could be proven to now be navigable-in-fact. If, however, this situation does not involve a farm drainage ditch and a determination can be made using DeGayner standards that it is now navigable we could assert jurisdiction over future projects.

2). Q: What procedure should we use?

A: Normal permit and/or enforcement procedures should be used for future projects that are considered navigable using DeGayner standards and do not involve farm drainage ditches. For future projects involving farm drainage ditches we will have the additional burden of proving that there was a previous history of navigability based on DeGayner. In cases where we have advance notice of proposed projects that would be subject to our jurisdiction we should notify the project proponent in writing of our position and advise them to apply for the applicable permits.

3). Q: May we apply Chapter 30 jurisdiction to past projects?

A: Asserting jurisdiction over past projects may be possible if we can prove that the stream was navigable at the time the project was constructed using the navigability standards that were in place at

that time. If the stream was considered non-navigable at the time of construction we would not have jurisdiction over past projects even though the stream is considered navigable now. However, we would have jurisdiction over future projects.

4). Q: May we assert any floodplain jurisdiction over past or future projects? The stream in this situation is not mapped.

A: Yes. Although the area in this situation is not mapped, if any future channel modifications affect other property owners appropriate legal arrangements are required. Further detailed guidance for areas that are mapped and/or studied is included in a previous program guidance listed below. For past projects in unmapped or unstudied areas where we have Chapter 30 jurisdiction as outlined above, we can also assert floodplain jurisdiction where appropriate.

Related Guidance: December 9, 1988 from Bob Roden, Chapter 80, Water Regulation Handbook and Chapter 3, Floodplain/Shoreland Guidebook

Requested by: Dale Lang- NCD

Drafted by: John Coke- WZ

Reviewed by: Scott Hausmann WZ/6

Larry Larson

Mike Cain- LC/5

## CORRESPONDENCE/ MEMORANDUM

## STATE OF WISCONSIN

DATE: April 5 1993 FILE REF: Program Guidance

TO: District Directors

DISTRIBUTION: District Water Mgmt. Supervisors  
Area Water Mgmt. Specialists  
Bureau of Water Reg. and Zoning  
County Zoning Administrators  
City/Village Zoning Administrators  
Bureau of Legal Services  
Regional Planning Commissions

INSERTION: Floodplain/Shoreland Guidebook, p. 4.11; Water Regulation Handbook, Chapter 30

FROM: Scott Hausmann

SUBJECT: Applicability of Chapter 30 and Shoreland Zoning to Farm Drainage Ditches Navigable-in-fact But Without Stream History

### SUMMARY OF GUIDANCE

When use of any parcel adjacent to a ditch that is navigable-in-fact is converted from agriculture, Chapter 30 applies even if the ditch had no stream history. Shoreland zoning applies whenever a structural use is proposed, even if the structure is part of an agricultural use.

The statutory language regarding drainage ditches must be read as an exemption for a particular use of land (agriculture) rather than as an exemption for a waterway or segment of a waterway. Clearly, agricultural and nonagricultural activities can have equal impacts on waterways, but agriculture has a special status that should not interfere with protection of waters from the impacts of other uses.

### STATUTORY GUIDANCE

#### *Navigable Waters*

Section 30.10(4)(c) says that farm drainage ditches without stream history are not navigable, defining farm drainage ditches as "any artificial channel which drains water from lands which are used for agricultural purposes."

The phrase in section 30.10(4)(c), "lands which are used for agricultural purposes," supports the conclusion that the exemption applies to parcels of land. Reading the statute to mean that ditches themselves are not navigable, therefore exempt, until all of the lands drained by the ditch are converted from agriculture would allow anyone (farmer or not) with land adjacent to a ditch to alter the ditch in any way they saw fit. In addition, such a reading allows lands along a ditch to be structurally developed, before regulations would apply - resulting in impacts to the waterway and a host of nonconforming uses.

Section 144.26(2)(d) defines navigable waters as "Lake Superior, Lake Michigan, all natural inland lakes within this state and all streams, ponds, sloughs, flowages and other waters within the territorial limits of this state, including the Wisconsin portion of boundary waters, which are navigable under the laws of this state."

Sections 144.26 (2m) and 87.30 (1m) specify three conditions which must all be met in order for a parcel

adjacent to a ditch to be exempt from shoreland zoning. One of the conditions is that the parcel remain in nonstructural agricultural use. As a result, shoreland zoning applies to any structural use adjacent to a ditch that is navigable-in-fact.

### ***Agriculture***

For Chapter 30 determinations, use the definition of agriculture in 30.40(1): "Agricultural use" means beekeeping; dairying; egg production; feedlots; grazing; floriculture; raising of livestock; raising of poultry; raising of fruits, nuts and berries; raising of grains, grass, mint and seed crops; raising of vegetables and sod farming. Based on the definition above, nonstructural agricultural uses are pasture and cultivation.

## **PRACTICAL OUTCOMES**

### ***Administration***

- When someone inquires about local or state permits, when a local zoning decision is reviewed, or when a complaint is received, then the regulations will be applied. Proposals for activities from owners whose lands are not in agricultural use require Chapter 30 and shoreland zoning permits.\* Any proposal for structural use requires a shoreland zoning permit. No tracking of land use change for this purpose is needed.
- Without additional staff at state or local levels, we will respond to complaints and consider the same factors as we do in deciding whether to pursue enforcement for any other Chapter 30 or zoning situation.

### ***Impacts on Waterways***

Although most ditches do not receive much public recreational use, the objectives of Chapter 30 and shoreland zoning can be significantly affected by activities along ditches. Runoff carrying pollutants can readily reach natural navigable waterways through ditches. Ditches can acquire significant fish and wildlife habitat and recreational values even while in use for agricultural drainage.

Note: Floodplain zoning regulations only apply if a ditch is mapped on the floodplain regulatory map, whether or not the ditch is navigable in fact.

### ***Impacts on Navigation***

Under existing law as portions of these ditches are no longer legally declared nonnavigable by s. 30.10, the public gains the right to navigate in those portions. This legal requirement obviously can create a very practical problem - alternating segments of public and private water on the same waterway until major portions if not the entire ditch is open to navigation. We would ask that staff do their best in dealing with this potential problem and to advise us of any problems which come up.

## **RELATED GUIDANCE**

Shoreland Zoning Jurisdiction - 3/28/85

Opinions of the Attorney General - 3/6/74 and 10/7/74; 3/8/90

Mine Reclamation: Navigable Waters - 1/28/88

Navigability Determinations - 8/20/90

## **DRAFTED**

Mary Ellen Vollbrecht, SED  
Scott Hausmann, WZ/6

## **REVIEWED**

Michael Cain, LC/5  
Linda Meyer, LC/5  
Robert W. Roden, WZ/6

**From:** Simon, Byron D  
**Sent:** Tuesday, August 01, 2000 9:24 AM  
**Subject:** FW: Prohibiting navigation

print this out and insert in chapter 30 of your water reg guidebook.

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**From:** Andryk, Tim A  
**Sent:** Tuesday, August 01, 2000 8:52 AM  
**To:** Cain, Michael J; Kavanaugh, Edwina C; Simon, Byron D; Stoerzer, Lois J; Eisch, Shawn T  
**Cc:** Koch, Richard J - DNR; Rosenberger, Robert; Hanaway, Michael J  
**Subject:** RE: Prohibiting navigation

A few years ago in response to a complaint on the Rock River sign going into Horicon, I had some research done on the subject.

Federal statutes grant authority to the Secretary of Interior to regulate or prohibit boating recreation and navigation on National Wildlife Refuges. The Secretary has done this through 50 CFR S. 27.32, which authorizes U.S. Fish and Wildlife Service to prohibit or set conditions on the use of boats in National Wildlife Refuges. Federal case law says that the federal government can interfere with river navigation guaranteed by state law as part of a detailed and comprehensive regulatory plan, or to carry out treaty obligation.

Basically, the federal law pre-empts the state law and state constitution which establish state public rights of navigation on these waters. Consequently, the U.S. Fish and Wildlife Service can post these closed to boating, but they should be doing it in consultation with the state as part of comprehensive management plan.

Tim Andryk  
Attorney  
WI DNR Bureau of Legal Services  
608-264-9228

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**From:** Eisch, Shawn T  
**Sent:** Monday, July 31, 2000 3:30 PM  
**To:** Cain, Michael J; Kavanaugh, Edwina C; Simon, Byron D; Stoerzer, Lois J; Andryk, Tim A  
**Cc:** Koch, Richard J - DNR; Rosenberger, Robert; Hanaway, Michael J  
**Subject:** Prohibiting navigation

In the Southwest corner of the map enclosed there is a navigable stream that goes into the Foxriver NWR. The feds have a sign at the entrance of the creek prohibiting access (I have not seen yet).

I spoke with Diane Kitchen -USF&WL who was unable to give me the reason, however concluded that the feds are allowed to exclude people from entering the refuge regardless of navigability (state jurisdiction). The Rock River in the Horicon marsh evidently has this same type of prohibition on navigability.

Does the feds have authority over the State to prohibit navigation through a refuge? If so could I get the documentation to show our Local Representative (Joan Spillner & Scott Kempley raised the issue).

Please comment.

*Shawn Eisch*  
Water Management Specialist



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